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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 1045

ANDREW J. NICHOLS, W. W. SHENK, AND ANNIE B. ALGUIRE,
Petitioners,

v.

WALTER A. TODD, TRUSTEE, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES V. HAYES,
Attorney for Petitioners.
Washington, D. C.
J. MAXWELL DICKEY,
Washington, D. C.

ARTHUR H. BARTELT,
Austin, Texas.

FRANK C. TRIBBE AND
RAYMOND R. DICKEY,
Of Counsel.
Washington, D. C.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Andrew J. Nichols, W. W. Shenk, and Annie B. Alguire pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on the 9th day of January, 1941 (R. 94), affirming the judgment of the District Court of the United States for the Northern District of Texas, Fort Worth Division, and in this connection respectfully show:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Early in 1931 Harry W. Elliott sold by mail throughout the United States approximately 26,700 interest assignments in certain oil and gas leases and royalties which he owned in the East Texas oil fields. (R. 5) These assignments were evidenced by certificates in a syndicate entitled "Harry W. Elliott 12-Way Syndicate". (R. 23) By their terms the certificates conveyed and transferred undivided interests in these oil and gas leases and royalties. (R. 20-24)

Several months thereafter Elliott made a second sale of oil and gas lease assignments which included most of the leases in the "12-Way Syndicate", and in addition, several other leases described in the new assignments.* (R. 5)

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*Footnote.

"State of Texas
County of Tarrant.

Whereas, certain oil and gas leases and royalties have been acquired and contracted for by Harry W. Elliott of Fort Worth, Tarrant County, Texas, said leases and royalties being located in various counties of Texas, to-wit:

Milam County, Kimball County, Dawson County, Nacogdoches County, Rusk County, Cherokee County, and Gregg County.

Whereas, the said oil and gas leases and royalties are now held by Harry W. Elliott and, whereas, the said Harry W. Elliott, hereinafter referred to as the party of the first part, has started operations and is now drilling and preparing to drill wells on certain of the above stated leases,

Now, Therefore, for and in consideration of $.....cash in hand paid and other good and valuable considerations, together with the conditions, covenants, and agreements hereinafter contained and set forth to be performed and kept by the parties hereto, their successors and assigns, set over, transfer and convey unto the party of the second part, the said..... his successors and assigns, an undivided /26700ths interest in and to the aforesaid Leases, Royalties and wells to be drilled on same.

Provided, further, as a part of the consideration for this assignment, that the party of the first part shall be and he is hereby considered and appointed to act as agent for the party of the second part, his successors and assigns, in reference to the said wells and all future drilling, developing, equipping, operating, caring for, marketing, and storing or producing from the aforesaid leases, and that the said party of the first part shall have the power to sell and deliver, as lawful agent of the party of the second part, any or all of said leases, provided; that then and there all money and considerations received from such a sale shall then and there be divided and distributed according to the ratio the undivided interest owned by the party of the second part bears to the said leases.

And for the same consideration the undersigned, for himself and his heirs, successors and assigns or representatives, does covenant with the said assignee,

Elliott, in this second sale, sold 150,000 undivided interest assignments, which conveyed to the purchasers all rights in the oil and gas leases and royalties which Elliott owned. (R. 5) This latter syndicate was known as "Harry W. Elliott Interests Assignment". Elliott is named in the assignment certificates of both syndicates as agent to operate and manage the resulting oil and gas business for the interest owners. (R. 7, Par. 9)

Petitioners, Andrew J. Nichols, a resident of the District of Columbia, W. W. Shenk, a resident of Minneapolis, Minnesota, and Annie B. Alguire, a resident of Belvedere, Illinois, were among the purchasers of these latter assignments. (R. 3-4)

In 1932 an involuntary petition in bankruptcy was filed against Elliott in the United States District Court for the Northern District of Texas, Fort Worth Division. Elliott filed his answer but the issues joined thereby were never adjudicated. (R. 9, Par. 12)

In 1933 Elliott made an offer of extension and composition to his creditors under Section 74 of the Bankruptcy Act. (R. 9, Par. 12) This was accepted and confirmed. (R. 9, Par. 12) Elliott listed as his assets in said offer the leases and royalties in which he had sold the undivided interest by assignment certificates of the two syndicates referred to hereinbefore. (R. 53, 54) With the possible exception of some few undivided interest assignments which he may have retained for himself, Elliott had no beneficial interest in any of these properties (R. 57), merely retaining the

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his successors and assigns that he is the lawful owner of said leases and the undersigned has good right and authority to sell and convey the same and that all rentals due and payable thereunder have been duly paid.

This contract is, in fact and effect, a legal agreement and relationship between the parties of the first part and second part, and constitutes the sole description of this transaction and agreement between the parties of the first part and the second part, and no other agreement, written or oral, shall constitute or bear upon this transaction and agreement.

In Witness Whereof, the undersigned owner and assignor has signed this instrument, in the presence of witness, this

.....

Of Tarrant County, Texas.

Witness:

....."

record legal title in himself as trustee and agent-manager for the benefit of the owners of the undivided interest assignments. (R. 69)

Three years later Elliott defaulted on the extension and composition, and on June 15, 1936, Walter A. Todd, who had until that time served as Custodian of the debtor's estate, was appointed Trustee by the District court (R. 44, 63), and has continued in that capacity until the present time. Todd managed said oil properties as Trustee. Under his direction most of the oil producing properties were sold prior to January 10, 1940, (R. 14, Par. 13) and the remaining properties have since been sold. Petitioners had no notice or knowledge of the above described bankruptcy proceedings. (R. 10, 16, Par. 17)

In 1935 and early 1936 certain alleged interest owners in both syndicates applied in two Texas State courts for the appointment of receivers to represent all classes of interest owners. (R. 39, 54) Petitioners received no notice of, or pertaining to, these receiverships. (R. 12) Receivers were appointed and they applied to the district court for the return of the oil and gas lease properties to them as receivers for the owners. (R. 11, 39-40, 54) The district court denied such relief (R. 57), and one state court receiver "accepted" the district court's jurisdiction. (R. 42)

Notice to file proof of claims was sent out by the Referee in Bankruptcy under date of August 26, 1939. (R. 63) This was the first and only notice of the above described proceedings ever received by petitioners and others similarly situated from either the Referee, the Trustee or anyone else, including the state court receivers. (R. 10, 11, 12, 13)

On January 10, 1940 petitioners filed a Motion for Leave to Intervene and attached thereto a Petition of Intervention praying that the district court relinquish jurisdiction and control over their property and return the same to petitioners and others similarly situated as co-owners thereof according to the terms of their undivided interest assignments. (R. 1-20) Respondent Todd failed to make any answer, or plea to said Motion, but upon Motions to

Dismiss made by the two state court receivers (R. 25-33) the district court dismissed said application asking leave to intervene (R. 33-34) from which ruling an appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit.

After a hearing (R. 86) the Court of Appeals, on January 9, 1941, affirmed the lower court's decision by a majority opinion, concurred in by an Associate Justice as to result but not as to substantive reasons. (R. 87-93)

Petitioners filed a Petition for Rehearing on January 30, 1941, (R. 95) and the Court of Appeals denied said petition on February 11, 1941. (R. 103)

It is from said judgment of the Circuit Court of Appeals for the Fifth Circuit that petitioners apply to this Honorable Court for a writ of certiorari.

II.

JURISDICTION.

This Court has jurisdiction to review on certiorari said judgment of the Circuit Court of Appeals for the Fifth Circuit by virtue of Title 11 U. S. C. Section 48(c) and Section 24(c) of the Bankruptcy Act of June 22, 1938, wherein the Supreme Court is vested with the power of review over bankruptcy proceedings.

This Court also has jurisdiction to review on certiorari by virtue of the Judicial Code, Section 240, as amended by the Act of February 13, 1935, 42 Stat. 938; (U. S. C. A. Title 28, Section 347) and also by virtue of Rule 38, 5(b) of the Revised Rules of this Honorable Court.

III.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court as expressed in the cases of *York Mfg. Company* v. *Cassell, et al.*, 201 U. S. 344, 26 S. Ct. 481, and

Ochoa v. *Morales*, 230 U. S. 139, 33 S. Ct. 1033. In the instant case the Court of Appeals sanctioned the disposal of petitioners' property in which the debtor owned no interest.

2. Whether the decision of the Court of Appeals is in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit concerning the same legal proposition involved in the case of the *United States* v. *Northern Security Co., et al.*, 128 Fed. 808. In the instant case the Court of Appeals held in the majority opinion, "It is not seriously denied that they had actual notice of what was being done. . . .", and in the concurring opinion said, "They have . . . acquiesced too far".

3. Whether the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial procedure, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, in that the Court of Appeals in the instant proceeding treated the petitioners as creditors, yet denied them the notice required to be given them by Section 58 (a) 2, 3 and 4 of the Bankruptcy Act of 1898 as Amended (11 U. S. C. Section 94).

4. Whether the decision of the Court of Appeals is in conflict with a decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Detroit Trust Co.* v. *Dunitz*, 59 F. (2d) 905, when the Court of Appeals in the instant case held that petitioners were guilty of laches.

5. Whether the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial procedure, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, in that the courts below have authorized and sanctioned the acts of the custodian and trustee in the taking possession of, and disposing of, property of the petitioners over which the courts below had no jurisdiction, and in that the Court of Appeals said, "The eggs

cannot be unscrambled, and whether or not the Court below should have administered the interest of the intervenors, it did so, no doubt under the view that by the terms of the assignments and the conditions of the estate, these interests could not be separated from the debtor's estate . . . ".

6. Whether the decision of the Court of Appeals is in conflict with another decision of that Court in the same matter, as rendered in the case of *Todd, Trustee* v. *Pettit, et al.*, 108 F. (2d) 139. In the instant case the Court considered the petitioners as creditors with rights subservient to those of the debtor and his personal creditors as to petitioners' properties.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Such action of the courts below is violative of the doctrine expressed in the *York* case, *supra*, wherein it is stated that "Under the provisions of the Bankruptcy Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued". It is shown by the assignment certificates that Elliott was a mere agent for petitioners and others similarly situated as to the properties, the ownership of which he had assigned to them as undivided owners. The acts of the courts below and the subsequent authorized sales of said properties by the trustee were a taking of property without due process of law and therefore violative of the 5th Amendment of the United States Constitution. "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." (*Ochoa* v. *Morales, supra*)

2. Such a holding by the Court of Appeals is diametrically opposed to the record when it said in the instant proceeding,

"It is not seriously denied that they (the petitioners herein) had actual notice of what was being done . . .". The record discloses that the petitioners alleged in their original petition of intervention attached to their application for leave to intervene that they had no notice of any of these proceedings. (R. 16, Par. 17) This has never been rebutted.

3. Petitioners insist that they are owners, not creditors; but if they be creditors, then the district court failed to comply with Section 58 of the Bankruptcy Act of 1898 as Amended which provides for notice to creditors as to examinations of the bankrupt, hearings upon application for the confirmation of a composition, meetings of creditors, and proposed sales of property. Petitioners did not receive any of the notices provided for in said Section 58 of said Act.

4. Petitioners contend that laches could not begin to run against them when the district court had no jurisdiction over the petitioners' property. In *Detroit Trust Co.* v. *Dunitz, supra*, the Circuit Court of Appeals for the Sixth Circuit held, "A party cannot be charged with laches for not asserting his claim in a proceeding in which the Court did not have jurisdiction." Petitioners further contend that laches had not run against them at the time of filing their application for leave to intervene with the Petition of Intervention attached thereto, since their first notice of the bankruptcy proceeding was sent them under date of August 26, 1939 (R. 63) by the Referee, and they filed said application on January 10, 1940 (R. 1), or a little more than four months after receipt of said notice, which was not, it is respectfully urged, an unreasonable lapse of time.

5. The seizure and disposal of petitioners' property were arbitrary acts that departed from the accepted and usual course of judicial proceedings in that the courts below had no jurisdiction over the subject matter here in issue, since the debtor owned no interest in the property he had previously assigned to petitioners and others similarly situated. The refusal of the courts below to recognize the sep-

arate and distinct ownership of petitioners, and to "unscramble the eggs", was a departure from the accepted and usual course of judicial proceedings, since the "unscrambling of eggs" is a recognized judicial function.

6. By the decision of the Court of Appeals in the instant proceeding, petitioners and others similarly situated are held to be creditors of the bankrupt.

This same Court of Appeals in the *Todd* v. *Pettit* case, *supra*, held in a proceeding involving this same bankruptcy matter that the holders of the interest assignments were owners of these same oil properties.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9564, styled *R. B. Dickey, et al., Appellants,* v. *Walter A. Todd, Trustee, et al., Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fifth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated May 10, 1941.

JAMES V. HAYES,
Attorney for Petitioners.

J. MAXWELL DICKEY,
Washington, D. C.

ARTHUR H. BARTELT,
Austin, Texas.

FRANK C. TRIBBE AND
RAYMOND R. DICKEY,
Washington, D. C.
Of Counsel.

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BRIEF IN SUPPORT OF APPLICATION FOR PETITION OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit in the above entitled matter in the said Circuit Court of Appeals is contained on pages 87 through 93 of the Record and is reported in Volume 116 F. (2d) at page 979.

II.

Jurisdiction.

The date of the Judgment of the Circuit Court of Appeals is the 9th day of January, 1941. Petition for Rehearing was made and denied February 11, 1941 (R. 103). This Court has jurisdiction by virtue of Title 11 U. S. Code Section 48 (c) and by virtue of Title 28 U. S. C. A. Section 347, and also by virtue of Rule 38, 5 (b) of the Revised Rules of this Court.

III.

Statement of the Case.

The statement of the case is stated under heading No. I in the petition and in the interest of brevity the statement is not repeated at this point.

IV.

Specification of Errors.

1. The Court of Appeals erred in finding petitioners and others similarly situated are creditors and not owners and is in direct conflict with the same Court's ruling in another case involving the same subject matter, *Todd, Trustee* v. *Pettit, et al.*, reported in 108 F. (2d) 139.

2. The Court of Appeals erred in finding that the district court had ever obtained jurisdiction over the oil properties herein involved.

3. The Court of Appeals erred in finding that petitioners did not seriously deny they ever received notice pertaining to any of the proceedings incident to the bankruptcy matter of the debtor, Elliott, and is in direct conflict with the record.

4. The Court of Appeals erred when it said petitioners were guilty of laches.

5. The Court of Appeals erred when it sanctioned the district court's acts whereby petitioners' properties were sold or otherwise disposed.

6. The Court of Appeals erred in its decision whereby it sanctioned the denial of the right of notice to petitioners and others similarly situated in violation of provisions in the Bankruptcy Act.

7. The Court of Appeals erred when it said, "The eggs cannot be unscrambled . . ." in that the settling and adjudicating of rights is a fundamental function of the judiciary.

V.

Constitution, and Statutes Involved.

The Fifth Amendment to the Constitution of the United States. "No person shall . . . be deprived of . . . property without due process of law; . . ."

The Bankruptcy Act of 1898 as amended. Pertinent provisions are discussed elsewhere in the petition and this brief.

VI.

ARGUMENT.

Summary of Argument.

Elliott's interest in the oil and gas leases and royalties was an interest in real property and by virtue of the assignments he made, he conveyed interests in real property to petitioners and others similarly situated. Inasmuch as the debtor had assigned all the interest which he had in said properties, the district court had no jurisdiction over these properties in the debtor's bankruptcy matter.

The petitioners and others similarly situated can only be treated either as owners or creditors. The Court of Appeals held them to be creditors and yet sanctioned the acts of the district court from which petitioners had never received any notice, until the notice requiring the filing proof of claims.

The doctrine of laches cannot be applied when no notice had ever been given the petitioners, particularly when they acted within four or five months after receiving the first and only notice ever sent them. Further it is contended that laches can not apply where the court below never had jurisdiction.

Argument.

Under applicable local decisions of Texas it has been held that an undivided interest in an oil and gas lease is real property. *Waggoner Estate* v. *Sigler Oil Co.*, 19 S. W. (2d) 533; *Pantaze* v. *McDiel* (Civ. App.) 228 S. W. 962.

The record discloses that the debtor did assign all his interests to the various purchasers of the interest assignments (R. 69) and he had no interest in said real properties. Therefore having no interest in these properties, how then could the district court in a bankruptcy proceeding assume jurisdiction over such properties? It is well settled law that in a bankruptcy proceeding the court only has jurisdiction over property belonging to the debtor. Title 11, U. S. C. Chap. 2, Section 11 (7).

There are only two possible positions in which the petitioners and others similarly situated can be classified. They are either owners, which petitioners contend, or they are creditors which the courts below have held. (R. 91)

If petitioners and others similarly situated are owners, then the district court had no jurisdiction over their properties and having no jurisdiction the doctrine of laches cannot apply. *Detroit Trust Co.* v. *Dunitz*, 59 F. (2) 905.

If petitioners and others similarly situated are creditors then the court of appeals has sanctioned the failure of the district court to comply with provisions of Bankruptcy Act. 11 U. S. C. Section 94; Section 58 (a) 2, 3, and 4 of the Bankruptcy Act.

It is further respectfully contended that in either case the petitioners are not guilty of laches in that after receiving a notice pertaining to the bankruptcy proceedings, dated August 26, 1939 (R. 63) they did commence this action January 10, 1940 (R. 1) or a little more than four months from the date of the notice. Here it is pointed out to the Court that in the opinion of the Court of Appeals the court said, "Appellants claim the only notice which was ever sent them was dated June 14, 1939, directing them to file their claims with Glenn Smith, Referee." (R. 90) This statement is not in accordance with the Record in that the notice to file claims was dated August 26, 1939 (R. 63) and was pursuant to an Order of Court dated July 14, 1939. (R. 61)

Petitioners respectfully call the Court's attention to the case of *Todd, Trustee* v. *Pettit, et al.*, 108 F. (2) 139, decided December 14, 1939 by the same Court of Appeals. In that case pertaining to this same subject matter and involving the same oil and gas properties herein involved, the

court there said: ". . . Though these oil properties stood in the name of Elliott, (the debtor) the bill states he did not own them, but the two groups of unit holders did. . . . It is argued that a bankruptcy Trustee takes title to all property to which the bankrupt has title, even though it appears it be held in trust. Though this be true, when it appears that the bankrupt is only a trustee and has no beneficial interest in or claim against the property, the court ought to turn it over to its true owners where possible. . . . *The unit holders are not by virtue of their certificates creditors of Elliott. They are the equitable owners of these trust properties.* . . . " (Italics ours)

CONCLUSION.

From a consideration of the foregoing matters, it appears, first, that the decision in the instant case is in conflict with decisions in other Circuit Courts of Appeal, which conflict should be resolved by the United States Supreme Court; second, that the decision in the instant case is in direct conflict with a former decision of the same Court of Appeals involving the same subject matter; third, that in the instant case there has been an utter disregard of applicable sections under the Bankruptcy Act; and lastly, the fundamental right under the Fifth Amendment to the United States Constitution has been violated by the taking of property belonging to petitioners and others similarly situated without due process of law.

Wherefore, petitioners respectfully submit that the writ of certiorari prayed for should be granted.

JAMES V. HAYES,
Attorney for Petitioners.

J. MAXWELL DICKEY,
Washington, D. C.

ARTHUR H. BARTELT,
Austin, Texas.

FRANK C. TRIBBE AND
RAYMOND R. DICKEY,
Washington, D. C.
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